

©2020 Centre of Studies in European Union Law  
School of Law – University of Minho



## Online content sharing service providers' liability in the directive on copyright in the Digital Single Market

Isabel Espín Alba\*

*ABSTRACT: Digital technologies have transformed the way creative content protected by copyright is created, produced, distributed and accessed. The Directive on Copyright in the Digital Single Market aims to update copyright rules, taking into account changes in these paradigms. Of all the aspects of the reform, this paper critically analyses the content of Article 17, in order to deal with the so-called value gap that forced a change in the liability regime of the online content sharing service provider.*

*KEYWORDS: copyright infringements – value gap – platforms – online content sharing service provider.*

---

\* Professor of Civil Law at the Faculty of Law of the University of Santiago de Compostela.

## 1. The European Digital Single Market Strategy and Copyright<sup>1</sup>

The Strategy for Europe's Digital Single Market<sup>2</sup> sets out three pillars for the creation of an effective Digital Single Market: (a) improving consumer and business access to online goods and services across Europe; (b) creating the right conditions for digital networks and services to flourish; and (c) maximizing the growth potential of Europe's digital economy by investing in infrastructure and research to boost business innovation.

Within the first pillar described above is the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter, Copyright in the DSM Directive).<sup>3</sup>

One of the most controversial aspects of the CDSM Directive was the new regulation of liability of some kinds of digital platforms – specifically, online content sharing service providers – for the infringement of copyright, an issue that will be addressed within this paper. The abovementioned amendment to the general parameters of liability of intermediary platforms aims to respond to the growing concern for fairness in the distribution along the value chain of the value generated by some of the new forms of online content distribution.<sup>4</sup>

As a background to the issue, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Online Platforms and the Digital Single Market Opportunities and Challenges for Europe” expressed the wish to maintain the exemption from liability of information service providers, but recalled the need to take into account the protection of intellectual property rights. Therefore, different initiatives have been taken to encourage voluntary measures to filter and block content (algorithmic tools)<sup>5</sup> as well as legislative improvements in the sectoral regulation of audiovisual media services and copyright.<sup>6</sup>

Therefore, the writing of the Copyright in the DSM Proposal for a Directive,<sup>7</sup> in particular Article 13 (now Article 17 Copyright in the DSM Directive), started with a

<sup>1</sup> This paper is an updated version of the invited speaker's presentation at the Final Meeting of the “INTEROP - EU Digital Single Market as a political calling: interoperability as the way forward” Project, in Braga, 2-3 May 2019.

<sup>2</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions “A Digital Single Market Strategy for Europe”, COM(2015) 192 final, 6.5.2015, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0192>

<sup>3</sup> OJEU 17.5.2019.

<sup>4</sup> Underlined by the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Promoting a fair, efficient and competitive European copyright-based economy in the digital single market”, COM (2016) 592 final, 14.9.2016, <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-592-EN-F1-1.PDF>.

<sup>5</sup> Andrea Katalin Tóth, “Algorithmic Copyright Enforcement and AI: issues and potential solutions, through the lens of text and data mining”, *Masaryk University Journal of Law and Technology* 13:2 (2019): 365, points out that it is a matter of controlling digital uses through digital technologies.

<sup>6</sup> Julián López Richart, “Responsables, ma non troppo: las reglas de exención de responsabilidad de las plataformas para el intercambio de contenidos en línea en la directiva sobre derechos de autor en el mercado único digital”, in *Propiedad Intelectual y Mercado Único Digital Europeo*, ed. Concepción Saiz García et al (Valencia: Tirant lo Blanch, 2019), 315.

<sup>7</sup> Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD), 14.9.2016, COM(2016) 593 final.

clear intention to improve the position of copyright holders to negotiate and obtain fair remuneration for the exploitation of their content by online service providers that store and make publicly accessible large amounts of works uploaded by users of such platforms.

## 2. The value gap: the rise of the prosumers

The introduction of Article 13 in the Proposal (now Article 17 Copyright in the DSM Directive) caused a real stir among digital platforms and their users, – also consumers and academia – who launched a wide-ranging campaign against alleged censorship of content exchange and the rising costs of internet access, claiming that the European Commission had succumbed to the audiovisual and music industry lobby with its discourse on the value gap, to the detriment of citizens' interest in safeguarding their fundamental rights, especially freedom of expression.<sup>8</sup> Only a few EU rules have been the subject of such heated social debate in recent years as Article 13, which was finally drafted (now Article 17) in a more conciliatory version of the interests at stake.

Criticism of this rule has focused both on the costs and difficulty of implementing monitoring controls as well as on the side effects that filtering could have on the rights of freedom of expression and on the possibility of actually using the exceptions and limits to copyright.<sup>9</sup>

In any case, what was always present in the legislative process and is contained in Article 17 Copyright in the DSM Directive is the need for fairer remuneration for rights holders that minimizes the so-called value gap.

It is a known fact that the consumption of content that is uploaded and shared on different online service platforms is growing exponentially. A significant part of this increase is also justified by the emergence on the market of a new consumer profile: the prosumer,<sup>10</sup> an active consumer who does not merely enjoy content, but also generates his or her own content - user-generated content (hereinafter, "UGC")<sup>11</sup> – and makes it publicly available, often transforming works and performances protected by copyright.<sup>12</sup>

<sup>8</sup> Global digital players, internet activists, European technology start-ups and the European Consumers Organisations opposed the overhaul. See details in the study "Culture and creative sectors in the European Union – Key future developments, challenges and opportunities" requested by the CULT committee (European Parliament)", September 2019, [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/629203/IPOL\\_STU\(2019\)629203\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/629203/IPOL_STU(2019)629203_EN.pdf). In fact "Criticism of proposed Article 13 focused on three main types of harms: harms to individuals' expressive freedom, harms to online businesses, and harms to innovation and competition at the internet's application layer" (Annemarie Bridy, "The Price of closing the value gap: how the music industry hacked EU Copyright Reform", *Vand. J. Ent. & Tech. L.* (2019):123.

<sup>9</sup> Summarizes the discussions Belén Aige Mut, "El polémico 'fin de internet' a raíz del artículo 13 de la propuesta de Directiva sobre copyright: ¿serán eficientes las garantías propuestas en el mismo?", in *Justicia: garantías versus eficiencia*, ed. Rafael Bellido (Valencia: Tirant lo Blanch, 2019), 507-512.

<sup>10</sup> See Concepción Sáiz García, "Creatividad 3.0", *Revista Derecho y Nuevas Tecnologías* 42 (2016): 121

<sup>11</sup> CGU is a meta-legal concept that includes very diverse behaviours. This is a fairly broad category that can range from artistic creations made with 3D animation technology by non-professionals to journalistic content generated by citizens who have your smartphone takes pictures of an event that might be of interest informative. Thus, CGU are all those contents that a consumer of technologies is able to create in an original way by adapting, modifying or incorporating third party works, but also non-creative interactions such as giving their unprocessed opinions, participating in games, draws, interviews, etc., all at the click of a button. See Isabel Espín Alba, "Transmedia, fanfiction, contratos y derechos de autor", *Actas de Derecho Industrial y Derechos de autor* 39 (2019): 196.

<sup>12</sup> The Green Paper on "Copyright in the Knowledge Economy" [COM(2008) 466 final, 16.7.2008]

The spread of information and communication technologies and the popularization of tools and platforms for the production and dissemination of audiovisual contents have favoured a real explosion of creations made by the users. This type of production is usually carried out with few means, driven by individuals and non-professional groups that usually use the Internet as a base camp. They point to new forms of participation in which a new media agent emerges, the consumer, citizen or user himself. They are productions that make possible the incorporation of the public in the production process until the redefinition of their own model of cultural production and consumption

The issue lies in the volume and quantitative impact of the creations generated by the consumers of artistic and literary works. But it is also a qualitative question, since now the action of the prosumer is foreseen and encouraged by the producers of digital contents themselves. For example, the creators of the transmedia strategy encourage the active participation of the consumer to generate new content from the transmedia product created for dissemination in different formats, channels and platforms, some of them created for the purpose of multiplying the active participation of users. In any case, the possibility for audiences to share through social platforms or to generate their own content is raising new ethical and legal issues.

Of all the issues that relate to UGC within intellectual property rights, the question of the lack of authorization for the transformation of works available on such platforms stands out.

When users create original works without the authorization of the holders of the intellectual property rights in the pre-existing works, they are infringing their rights, in particular the right of transformation.<sup>13</sup>

Due to the high consumption rates of digital content, many of which is protected by copyright, it should be accompanied by an exponential increase in the profits of the owners of copyrighted and related works and services. However, this is not the case for sectors as important to European GDP as the audiovisual and music industries<sup>14</sup>. Copyright holders have long claimed a fairer share of the increase in revenue from the supply and sale of digital products.

The key word in this intense debate is the value gap, a concept imported from economic studies to refer, in this case, to the enormous difference between the profits

---

already recognised that “ Consumers are not only users but are increasingly becoming creators of content”. It pointed that: “ Web 2.0 applications such as blogs, podcasts, wiki, or video sharing, enable users easily to create and share text, videos or pictures, and to play a more active and collaborative role in content creation and knowledge dissemination”.

<sup>13</sup> Therefore, there is a growing debate on the need for a genuine status of derivative works and their licensing or at least a reform of the limitations system to accommodate the reality of transformative uses by users. Espín Alba, “Transmedia”, 195. On the issue of the creation of a specific limit for CGUs, combined with equitable remuneration, see Martin Senftleben, “User generated content: towards a new use privilege in EU copyright law”, in *Research Handbook on Intellectual Property and Digital Technologies*, ed. Tanya Aplin (Elgar Publishing, 2020), 136-162.

<sup>14</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a modern, more European copyright framework”, COM(2015) 626 final (OJUE 9.12.2015) and the Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market’, [(COM(2016) 593 final — 2016/0280 (COD)]. OJUE 21.4.2017. From the perspective of the rightholders, see CISAC, *Global Collections Report 2019 (For 2018 Data)*, p. 26-27, accessed May 29, 2020, <https://www.cisac.org/CISAC-University/Library/Global-Collections-Reports/Global-Collections-Report-2019>.

of intermediaries in copyright-protected content services and the values received by the rightholders. As a result, the so-called “value gap” has developed, in which the services of the platform retain the value of the cultural and creative works, which is detracted from the creators; and the gap gets deeper if we compare comparatively new business models, such as paid streaming platforms with older business models.

The value gap has created an inefficient and iniquitous market and threatens the long-term strength of the Union’s cultural and creative sector and the success of the digital single market. Therefore, liability exemptions should only apply to truly neutral and passive online service providers and not to services playing an active role in the distribution, promotion and monetisation of content at the expense of creators.

In that sense, a 2014 IFPI (International Federation of the Phonographic Industry) report<sup>15</sup> describes two different types of streaming strategies.<sup>16</sup> On the one hand, there are subscription platforms such as Spotify or Deezer, which include in their model the willingness to negotiate and pay royalties for the use of the works, and on the other hand, there are service providers operating under the model of embedded advertising, which are reluctant to pay royalties for the use of the copyrighted works and benefits, on the grounds that they are not the ones who upload the content to the network but their users. They claim that they are only hosting intermediaries, which allows them to be protected in the case of safe harbours, i.e. to be considered as mere hosts, without final responsibility for the use of the protected content uploaded by the users.

The sector that can provide us with the most data is the music industry. The common denominator of these studies is the finding that while Youtube is paying hundreds of dollars for every million streams, streaming services are paying thousands of euros. In fact, after a deep crisis of the analogical model, derived from the content piracy through digital technologies, an important bet was made for the public communication of contents through platforms such as Spotify, Deezer, Pandora, Apple Music, Tidal, Napster, Google Play Music, which offer subscription services, both free and premium. This has meant an upturn in the industry; however, despite improved revenue figures, there is still a feeling that they are not being fairly remunerated for the use of their works. Platforms such as YouTube are seen as intermediaries that use artistic content to attract users, but are unwilling to recognize the fair value of content protected by intellectual property rights.

As a result, the EU rule under consideration (Article 17 Copyright in the DSM Directive) is in fact a mechanism designed to meet the challenge of transferring value from online intermediaries to creators in today’s digital environment. It seeks to address the issue that, despite the fact that more content is being consumed than ever before, there is no corresponding increase in revenue for the creative sectors and that some intermediaries do not satisfy fair licenses commensurate with the value of their use of the content.

<sup>15</sup> Global Music Report”, IFPI, accessed March 18, 2020, <https://www.ifpi.org/downloads/GMR2016.pdf>.

<sup>16</sup> And always on the rise. A 2019 study, also by IFPI, states that digital revenues now account for more than half (58.9%) of the global recorded music market. Total streaming revenues increased by 34.0%. By the end of 2018, there were 255 million users of paid subscription accounts globally. “IFPI”, accessed March 18, 2020, <https://www.ifpi.org/recording-industry-in-numbers.php>.



In order not to lose perspective on the issue, it is worth remembering that the history of copyright is the history of the evolution of technological media, so that this type of legal crossroads requiring creativity and the legislator's desire to balance interests is not new.

In particular, the value gap was behind the creation and construction of different legislative techniques in the field of intellectual property. A significant number of anecdotes illustrate this eternal struggle between fair remuneration for the creators of protected content and the intermediaries, users and other economic agents involved in the circulation of products containing protected works or services. There is a mismatch between the exponential increase in the consumption of music and the return of profits for rightholders.

One of the oldest, referring to the very construction of what we understand today as “*right of public communication*” leads us to a judicial dispute between the creators of intellectual works and the intermediaries of their communication to the public. In 1847, the composers Parizot and Henrion, after attending the performance of one of their works at the Les Ambassadeurs, a Café-Concert in Paris, refused to pay for the seats and the drinks, claiming that the owner was also selling music and songs to his customers without paying the authors. The matter was taken to the French courts which ended up recognizing a right of public communication in each musical performance and the possibility of collective management by the authors themselves, with the creation of one of the most important management societies: the *Société des Auteurs, Compositeurs et Editeurs de Musique* (SACEM).<sup>17</sup>

### 3. The liability of platforms in the E-Commerce Directive (EC Directive)<sup>18</sup>

In the previous framework of the reform represented by the Copyright in the DSM Directive it was understood that these online content sharing service providers, with regard to the content uploaded by users, were only hosters.<sup>19</sup> Through this moderate level of requirement, the aim was to recognize the value of intermediary platforms in the information society and to encourage the growth of the supply of service providers.<sup>20</sup>

The Communication “Online platforms and the digital single market. Challenges and opportunities for Europe” highlights the importance of different forms of

<sup>17</sup> Delia Lipszyc, *Derecho de Autor y Derechos Conexos* (Buenos Aires: UNESCO, 1993), 412.

<sup>18</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), OJ L 178, 17.7.2000.

<sup>19</sup> Pedro De Miguel Asensio, “Mercado Único Digital y Propiedad Intelectual: Las Directivas 2019/789 y 2019/790”, *La Ley Unión Europea* (2019): 1-16.

<sup>20</sup> In this regard, the so-called safe harbour for the EC Directive means that the liability of information society service providers is removed or mitigated when their contribution to the infringement is limited to transmission, linking, hosting and dissemination of information generated by third parties. In fact, the concept and scope of safe harbours suggests a pro-platform interpretation. See Esther Arroyo Amayuelas, “La responsabilidad de los intermediarios en internet ¿Puertos seguros a prueba de futuro?”, *Cuadernos de Derecho Transnacional* 12 (2020): 808-837 and Julián López Richart, “Un nuevo régimen de responsabilidad para las plataformas de almacenamiento de contenidos generados por usuarios en el Mercado Único Digital”, *Pe.i, revista de propiedad intelectual* 60 (2018): 67-126. Also *Judgments Google France vs. Louis Vuitton* (23.3.2010, C-236/08, ECLI:EU:C:2010:159); *L'Oréal vs eBay* (C-324/09, 12.7.2011, ECLI:EU:C:2011:474); *Scarlet Extended vs SABAM* (C-70/10, 24.11.2011, ECLI:EU:C:2011:771); and *Promusicae vs Telefónica* (C275/06, 20.1.2008, ECLI:EU:C:2008:54).

digital platforms: online advertising platforms, online markets, search engines, social networks and creative media, application distribution platforms, communication services, payment systems and platforms dedicated to the collaborative economy; in creating “digital value”, especially by attracting significant levels of value (e.g. through data accumulation), facilitating new business projects and creating new strategic dependencies. However, under the heading of ensuring responsible behaviour of online platforms, it identified the exemption from liability of the EC Directive as one of the issues that should be addressed. Thus, in the Communication “Fighting against illegal content online. Towards increasing the responsibility of online platforms” it was specified that the lack of speed in withdrawing content is a factor in the exponential increase in potential economic damage which must be accounted for by the measures taken.

From the outset, the emergence of intermediary services on the market raised concerns about the extent of their responsibility for illegal content that could include, in the area of interest in this paper, infringements of intellectual property rights. Many issues were at stake when the European legislator faced the question of whether websites hosting protected works without authorization should be responsible for what users upload. These questions concerned not only copyright infringement and digital content providers to share, but for any type of digital platform and for any type of infringement of rights.

The aim was to encourage technological innovation and the proper functioning of the Internet. In this regard, it was considered that a comprehensive liability regime requiring intermediaries to monitor the actions of the users of their service would be a disincentive to invest in new applications that would improve the functioning of the Network, and would be a burden to their development and success.<sup>21</sup>

In light of the above, it was understood that the platforms were merely providers of intermediary services and, as such, did not infringe intellectual property rights since, strictly speaking, they did not reproduce or communicate works or related services, but merely provided the technical means for the users of their services to carry out these acts of reproduction and interactive public communication.

Even in the cases of those intermediary-aggregators who do not merely host content, but facilitate the availability of the same directly from their online site, they do not in principle have any control or editorial responsibility over the content uploaded to the platform by the users of the same, and it is the users who take the decision to store and make available the videos on the platform, and who are therefore responsible for any possible infringement of rights of third parties, especially when the intermediary implements effective procedures to receive notifications and to proceed with the removal of illegal content.<sup>22</sup>

The EC Directive already establishes a system for the withdrawal of content that hinges on two hitherto well-established and interrelated concepts. The first is the prohibition of imposing a general obligation on intermediaries to monitor illegal content. Secondly, such intermediaries will be liable only if, having actual knowledge of the illegality of the content hosted, they have not acted promptly to remove it or

<sup>21</sup> Diego Solana, “Aprobada la Directiva que cambiará internet”, *Web Cremades-Calvo Sotelo*, <https://www.cremadescalvosotelo.com/noticias-legales/aprobada-la-directiva-que-cambiara-internet>, last modified April 16, 2019.

<sup>22</sup> Fernando Carbajo Cascón, “Delimitación de la responsabilidad de los servicios de intermediación de la sociedad de la información (II)”, *Iustitia* (2015): 230.

to prevent access to it. To this end, effective knowledge requires that the owner of the rights correctly identifies the infringing content because, otherwise, they would be subject to this obligation of control. Therefore, in principle, it is the interested party who must duly identify the infringing content (e.g. by providing a specific URL) and explain why it should be removed (e.g. trademark infringement). Until such notification the intermediary enjoys a disclaimer which will only be deactivated if he does not withdraw the content diligently.

It follows from Articles 12 to 15 of the EC Directive that “*Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted*” [Article 12(1)],<sup>23</sup> nor in data storage services, whether temporary or not, provided that it did not intervene in any conscious way in the selection or editing of the content. It then states by way of guarantee that: “*the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent*” [Article 14(1)(a)] or “*the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information*” [Article 14(1)(b)].

These provisions have been interpreted in light of Recital 30<sup>24</sup> of Directive 2009/136/EC<sup>25</sup> amending Directive 2002/22/EC.<sup>26</sup> According to this interpretation providers are not required to monitor information transmitted over their networks or to bring legal proceedings against their customers on grounds of such information, nor does it make providers liable for that information. Responsibility for punitive action or criminal prosecution is a matter for national law, respecting fundamental rights and freedoms, including the right to due process”.<sup>27</sup> Along these lines, the judgments of the European Court of Justice of 16 February 2012 (*SABAM vs Netlog*),<sup>28</sup> 8 September

<sup>23</sup> On the condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.

<sup>24</sup> Recital 30 Directive 2009/136/EC “*Directive 2002/22/EC (Universal Service Directive) does not require providers to monitor information transmitted over their networks or to bring legal proceedings against their customers on grounds of such information, nor does it make providers liable for that information. Responsibility for punitive action or criminal prosecution is a matter for national law, respecting fundamental rights and freedoms, including the right to due process.*”

<sup>25</sup> Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJEU 25.11.2009).

<sup>26</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJEU 24.04.2002).

<sup>27</sup> Recital 30 2009/136/EC Directive.

<sup>28</sup> Judgment *SABAM vs Netlog* (Case C-360/10, 16.2.2012, ECLI:EU:C:2012:85) stresses the importance of preventive monitoring: “[p]reventive monitoring of this kind would thus require active observation of files stored by users with the hosting service provider and would involve almost all of the information thus stored and all of the service users of that provider”, concluding in paragraph 39 of the judgment that “*In the light of the foregoing, it must be held that the injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31*”.



2016 (GSMedia BV),<sup>29</sup> 14 June 2017 (*Stichting Brein Jack v Frederik Wullems*)<sup>30</sup> and 7 August 2018 (*SNB-REACT*),<sup>31</sup> among others, consider that imposing an obligation on an Information Society service provider to actively monitor all of its content (in this case, simply because of the risk of being punished if something infringes copyright) is completely disproportionate, both in terms of the technological investment involved and the risk of damaging the fundamental rights of the users of online content service provider<sup>32</sup>

Such a generous regime of exemption from liability, and, in the case of Spanish legislation, such a restrictive interpretation of the basic concept of “*effective knowledge*”, has practically consecrated a regime of impunity for information society intermediaries for the illegal activities or information of the users of their service, with the consequent disorder and - in some cases - defenselessness for the holders of rights that are flagrantly and massively violated through these aggregation services.<sup>33</sup>

For all these reasons, in the context described above, the sectoral reform represented by Article 17 Copyright in the DSM Directive was welcomed by the groups that defend greater protection of rightholders, as in fact the EC Directive standard (sufficiently reactive) may not be valid for certain services.<sup>34</sup> However, as will be seen below, the changes were not as radical as initially stated in the text of Article 13 DSM Proposal for a Directive.

## 4. Analysis of Article 17 Copyright in the DSM Directive

### 4.1. Introduction

The unclear wording present in all ten paragraphs of Article 17 of the Copyright in the DSM Directive requires, by way of introduction, a summary of its general characteristics and a clarification of the legislative mechanisms used to design a new liability model for digital content exchange platforms.

Briefly, Article 17 of the Copyright in the DSM Directive establishes a specific exemption regime, applicable to service providers for sharing content online, as opposed to the general regime in Article 14 of the EC Directive. It establishes a specific liability regime for what it calls ‘*online content sharing service providers*’. It emphasizes collaboration between rightholders and service providers, as well as in the search for the right balance between the fundamental rights at stake (e.g. paragraph 10). Thus, the need to respect the lawful uses of protected works and services, in particular those protected by exceptions and limitations, is stressed (paragraphs 7, 9 and 10). Similarly, it seeks to protect users’ personal data (paragraph 9), and prohibits the establishment of general monitoring obligations (paragraph 8).

<sup>29</sup> C-160/15, ECLI:EU:C:2016:644.

<sup>30</sup> C-610/15, ECLI:EU:C:2017:456.

<sup>31</sup> C-521/17, ECLI:EU:C: 2018:639.

<sup>32</sup> Margarita Orozco González, “El «value gap» y los mecanismos de detección de contenidos en materia de Propiedad Intelectual. Apuntes sobre la controvertida Propuesta de Directiva 2016”, *La Ley* 12986 (2018):7-9.

<sup>33</sup> Carbajo Cascón, “Delimitación”, 235-236.

<sup>34</sup> The EC Directive provides for such an approach as a general rule and therefore many authors consider that it would have been more appropriate to amend it rather than introduce a new liability mechanism in a sectorial copyright directive. Eduardo Serrano Gómez, “Los prestadores de servicios para compartir en línea contenidos cargados por los usuarios”, in *Medios de comunicación, contenidos digitales y derecho de autor* (Madrid: Reus, 2019), 64.

Thus, at a first level, it stipulates that providers of online content exchange services perform an act of communication to the public when their users make available protected works or content and that they must therefore reach agreements with the rightholders to avoid being liable for an infringement of copyright or related rights, recognizes that providers of these services may be exempted from liability if they prove that they acted diligently in reaching an agreement with rightholders and in trying to prevent the protected works or other subject-matter previously identified by rightholders from being accessible through their services.

#### **4.2. Concept of online content sharing service provider**

The liability and obligations set out in Article 17 only apply to the platform whose main activity is to provide access to a large amount of copyright-protected content, and it does so for commercial purposes. It is therefore a type of the more general category of hosting service providers referred to in Article 14 EC Directive<sup>35</sup>

Under the terms of Article 2(6) of the Directive, in its first paragraph: “*online content-sharing service provider*” means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes.

Thus, Recital 62 explains that “*The definition of an online content-sharing service provider laid down in this Directive should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it. Such services should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity*”.<sup>36</sup>

Analysis of whether an online content sharing service provider stores and provides access to a large amount of copyright-protected content should be done on a case-by-case basis and take into account a combination of elements, such as the audience for the service and the number of copyright-protected content files uploaded by users of the services.

To complete the description of the active provider, the European legislator established a presumption in Article 17(5). Thus, in order to determine whether the service provider has fulfilled his obligations under paragraph 4, and in the light of the principle of proportionality, the following factors, *inter alia*, must be taken into account: (a) the type, the audience and size of the service and the type of works or other subject-matter uploaded by the users of the service; and (b) the availability of suitable and effective means and their cost for service providers.

In order to ensure that there is no doubt about the importance of curbing mass economic exploitation offences, Article 2(6) makes it clear that they are excluded

<sup>35</sup> Pedro A. De Miguel Asensio, “Mercado Único Digital y Propiedad Intelectual: las Directivas 2019/789 y 2019/790”, *La Ley Unión Europea* 71(2019): 4.

<sup>36</sup> The final version of the Directive refers to “*providers of online content sharing services*”. The change in terminology that Serrano attributes to the desire for less “aggressive” language towards service providers is of no great significance (Serrano Gómez, “Los prestadores”, 71).

*“[p]roviders of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive”.*

#### **4.3. Concept and scope of communication to the public**

The new liability regime for online content providers laid down in the Directive does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.<sup>37</sup>

#### **4.4. Liability for copyright infringements: a new safe harbour**

Consequently, pursuant to Article 17 of the Copyright in the DSM Directive, providers of online content sharing services perform an act of communication to the public or of making available to the public for the purposes of the Directive when they offer the public access to works or other copyrighted material uploaded by their users. Therefore, they are not mere hosts, but carry out acts of communication to the public.

Because of that condition, providers of online content sharing services must therefore obtain authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for example by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other protected material.

In this case, the limitation of liability in Article 14 EC Directive shall not apply to providers of content sharing services.

For users and consumers of protected content it is of particular interest Article 17(2), as it requires Member States to provide that where a provider of online content sharing services obtains an authorisation, for example by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of services falling within the scope of Article 3 of Directive 2001/29/EC if they are not acting commercially or if their activity does not generate significant revenues.

However, if no authorisation is granted, providers of online content sharing services shall be liable for unauthorised acts of communication to the public, including making available to the public copyright works and other protected material, unless the service providers can demonstrate that the following criteria are met.<sup>38</sup>

*(a) Made best efforts to obtain an authorization.*

If authorisation is granted, the act of communication to the public by the service provider will fall within the scope of the authorisation granted by the rightholder. This is clear from Recital 69: “[w]here online content-sharing service providers obtain authorisations, including through licensing agreements, for the use on their service of content

<sup>37</sup> Recital 64 of Copyright in the DSM Directive makes it clear.

<sup>38</sup> The Copyright in the DSM Directive recognises the appropriateness of some kind of limitation of the service providers’ liability, since, after all, the content is not loaded by the provider but by its users (see Recital 66); however, the conditions of the safe harbour are very different from those contained in the EC Directive, in particular as regards monitoring obligations.

*uploaded by the users of the service, those authorisations should also cover the copyright relevant acts in respect of uploads by users within the scope of the authorisation granted to the service providers, but only in cases where those users act for non-commercial purposes, such as sharing their content without any profit-making purpose, or where the revenue generated by their uploads is not significant in relation to the copyright relevant acts of the users covered by such authorisations. Where rightholders have explicitly authorised users to upload and make available works or other subject matter on an online content-sharing service, the act of communication to the public of the service provider is authorised within the scope of the authorisation granted by the rightholder. However, there should be no presumption in favour of online content-sharing service providers that their users have cleared all relevant rights”.*

Article 17 of the Copyright in the DSM Directive and its corresponding recitals correct the content of Article 13 of the Copyright in the DSM Proposal for a Directive and omit any references to technical measures and instead requires “*best efforts*”.<sup>39</sup> As López Richart points out, the Directive has corrected this imbalance in the negotiating power of the parties, since it no longer requires the conclusion of licence contracts, but only the “*utmost effort*” to reach an agreement with the rightholders.<sup>40</sup>

While it is true that there is no general obligation of monitoring, taking into account that for the exemption from its liability the online content provider must act in accordance with the terms of Article 17(2) (b) (best efforts), it is reasonable to think that although it does not directly require the use of monitoring or filtering technologies, article 17 can reasonably be interpreted as inviting to achieve this result.

For this, in the words of López Richart, the new Liability Exemption Scheme, which is a derogation from the more generous scheme provided for in the EC Directive, may end up being of enormous practical importance, since far from encouraging agreements between rightholders and service providers for the use of protected works and content - which is the purpose of the rule. – it seems to call for the consolidation of the use of automated content recognition mechanisms - which had already been used by some platforms on a voluntary basis – as mechanisms for the preventive protection of copyright and related rights.<sup>41</sup>

*(b) Made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information*

Unlike Article 13 of the Copyright in the DSM Proposal for a Directive, it does not make express reference to the use of effective content recognition technologies, but the provision is certainly primarily concerned with them. There are currently a number of automated digital content recognition techniques used for different purposes.

And in any event, *(c) Acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).*

That is, in order to benefit from the exemption from liability, the service provider is required to act with diligence.

<sup>39</sup> Bridy, “The Price of closing the value gap”, 131.

<sup>40</sup> López Richart, “Responsables, ma non troppo”, 337.

<sup>41</sup> López Richart, “Responsables, ma non troppo”, 308-309.

Nevertheless, the Directive presents a number of limits and exceptions to liability. The same Article 17(3) clarifies that this does not, however, affect the possible application to service providers of the exclusion of liability in Article 14(1) of the EC Directive to those service providers for purposes falling outside the scope of this Directive.

The objections expressed by different groups against Article 17 (previously Article 13) were, on the one hand, the restriction of freedom of expression and, also, the discouragement of innovation by small and medium-sized platforms.

As far as freedom of expression is concerned, although in my view the answer would be the same even without this explicit mention, Article 17(7) of the Copyright in the DSM Directive clarifies that cooperation between providers of online content sharing services and rightholders does not result in unavailability of protected works or other subject-matter uploaded by users which do not infringe copyright and related rights, in particular where such protected works or other subject-matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State may invoke any of the following existing exceptions or limitations when uploading and making available user-generated content on online content sharing services:

- a) quotation, criticism, review;
- b) use for the purpose of caricature, parody or pastiche.

Also with regard to the extent of the liability contained in the provision it is clear that its application does not imply any general monitoring obligation [Article 17(8)].

Member States shall provide that providers of online content sharing services make available to rightholders, on request, adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and right holders, information on the use of the content covered by the agreements.

In any event, Member States shall provide that providers of online content sharing services establish an effective and rapid complaint and redress mechanism available to users of their services in the event of disputes concerning the blocking of access to, or removal of, works or other protected subject-matter uploaded by them.

When rightholders request that access to their specific works or other protected subject-matter be blocked or that those works or subject-matter be removed, they shall duly substantiate their requests. Complaints lodged under the mechanism provided for in the rule shall be processed without undue delay and decisions to block access to or remove downloaded content shall be subject to human control.

It should be stressed that this point should be given particular attention when States transpose the Directive. This is because this more individualized solution does not necessarily exclude de facto mass monitoring, since Article 17(2)(b) (best efforts) leaves the door open to more generalized monitoring of a preventive nature.

Member States shall also ensure that out-of-court dispute resolution mechanisms are available. Such mechanisms shall allow disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to users' right to effective judicial remedies. In particular, Member States shall ensure that users have access to a court or other relevant judicial body to claim the use of an exception or limitation with regard to rules on copyright and related rights.

This Directive shall in no way prejudice legitimate uses, such as uses covered by exceptions or limitations under Union law, nor lead to any identification of individual



users or to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

Online content sharing service providers inform their users in their general conditions of the possibility to use works and other material protected under exceptions or limitations to copyright and related rights under Union law.

#### ***4.5 Copyright and innovation***

Another concern in the design of the Directive was to avoid the possibility of a new liability regime harming innovation in the sector of small and medium-sized service platforms, particularly start-ups.

Member States should therefore provide that for new providers of online content exchange services whose services have been made available to the public within the Union for less than three years and whose annual turnover is less than EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC, the conditions of the liability regime set out in paragraph 1.4 shall be limited to compliance with the provisions of paragraph 4(a) and to acting diligently, upon receipt of a sufficiently reasoned notice, to block access to the notified works or other protected subject-matter or to remove such works or other protected subject-matter from their Internet sites.

Well, in order to avoid distortions, if the average monthly number of individual visitors to these service providers exceeds 5 million, calculated on the basis of the previous calendar year, these providers must also demonstrate that they have made their best efforts to prevent other downloads of the works and other protected material for which the holders have provided the relevant and necessary information.

### **5. Opportunities for transposition of the Copyright in the DSM Directive: the Spanish case**

In the case of Spain, the transposition of Article 17 Copyright in the DSM Directive will be an opportunity to reform the system of civil protection of the rights recognized in the Intellectual Property Law (hereinafter, "IPL"),<sup>42</sup> which combines mechanisms of both a preventive and a reactive nature. This Regulation has several technical shortcomings, highlighted by the doctrine, and reflected in contradictory case law.<sup>43</sup>

Carbajo Cascón draws our attention to the fact that the law in force in Spain contemplates essentially direct infractions of the exclusive rights of reproduction, distribution, public communication and transformation (Articles 18, 19, 20 and 21 IPL); although it also typifies infringements of intellectual property rights, in this case indirect ones, the circumvention of technological protection measures (Article 161 IPL) and information for the management of rights (Article 162 IPL), while Article 138 I and 139.1 a) IPL includes within the actions for cessation and compensation of illegal activities against intellectual property the acts or activities referred to in Articles 160 and 162 of the same legal text.<sup>44</sup>

<sup>42</sup> Royal Legislative Decree 1/1996, of 12 th april, enacting the consolidated text of the Intellectual Property Act.

<sup>43</sup> Summarizes it Sara Martín Salamanca, "Derecho de autor", in *Derecho de la Propiedad Intelectual*, ed. Miguel Ruiz Muñoz (Valencia: Tirant lo Blanch, 2017), 128.

<sup>44</sup> Carbajo Cascón, "Delimitación", 230.

The process of transposition of the Copyright in the DSM Directive will therefore be an opportunity to improve the legislative technique of this system of protection of the rights recognized in the IPL and, in particular, to extend and strengthen the measures to prevent copyright infringement.

Another aspect that would deserve special attention in a transposition process is the improvement of the licensing system, in order to encourage the lawful mass use of works. Article 17 Copyright in the DSM Directive does not impose a specific modality of authorization, it only points out the possibility of concluding a license contract (paragraph 2), therefore it could be appropriate that in the transposition the national legislator considers other formulas of authorization such as collective licenses, whether voluntary, extended or compulsory, or legal licenses.

On the other hand, despite not imposing an obligation to monitor content, the requirement for special diligence (“best efforts”) may influence the consolidation of the use of automatic content recognition mechanisms - which had already been used by some platforms on a voluntary basis - as tools for the preventive protection of copyright and related rights, so we must be attentive to a transposition that respects the rights of consumers and the general public.